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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CARL A. FUCCILLO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether evidence seized in reasonable reliance upon a search warrant should be admissible, where the warrant is subsequently found to be insufficiently particularized and the agents have seized certain items that were not within the scope of the warrant.

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CARL A. FUCCILLO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 808 F.2d 173. The opinion of the district court (App., *infra*, 13a-22a) is reported at 634 F. Supp. 358.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 24a) was entered on January 9, 1987. On February 26, 1987, Justice Brennan extended the time within

which to file a petition for a writ of certiorari to and including April 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 28, 1984, federal agents executed search warrants at three premises owned by respondent. In the course of the ensuing searches, the agents seized a large quantity of stolen clothing. Respondent was subsequently indicted on four counts of possession of goods stolen from an interstate shipment, in violation of 18 U.S.C. 659; one count of receipt of stolen goods moving in interstate commerce, in violation of 18 U.S.C. 2315; and one count of interstate transportation of stolen goods, in violation of 18 U.S.C. 2314. Respondent moved to suppress the seized evidence. After a hearing, the district court granted respondent's motion. The government appealed, and the court of appeals affirmed. App., *infra*, 3a, 4a-5a.

1. In support of its application for the search warrants in this case, the government submitted the affidavit of Special Agent Frisoli of the Federal Bureau of Investigation (FBI). According to the affidavit, two trailers containing 839 cartons of women's apparel and accessories valued at approximately $500,000 were stolen from Women's Specialty Retailing in Enfield, Connecticut, sometime between August 10 and 13, 1984. Attached to the cartons were delivery slips reflecting the stores that were to receive the merchandise. Among the stores listed on the delivery slips was Casual Corner. Aff. ¶ 2; App., *infra*, 3a-4a, 15a.

According to the affidavit, a confidential informant reported that on September 25, 1984, there was stolen

women's clothing at three premises owned by respondent: Fashion Apparel Distributors (FAD), a wholesale clothing distributor located in Revere, Massachusetts; Fashions on Tremont (FOT), a retail clothing store located in Boston, Massachusetts; and a warehouse located in Milford, Massachusetts. The informant reported that he or she had been inside FAD and the warehouse and had observed Casual Corner women's clothing that the informant knew to have been stolen. Aff. ¶¶ 3, 6; App., *infra*, 3a, 4a, 15a.

To corroborate the informant's representations, an FBI agent visited FOT on September 26, 1984. The agent was accompanied by Anne Sweeney, a manager of one of the Casual Corner stores. During the approximately 10 to 15 minutes that she spent in the store, Ms. Sweeney observed about $6,000 worth of Casual Corner merchandise and identified specific Casual Corner items. Ms. Sweeney noticed that the prices charged by FOT for the goods were substantially below their market value. She also observed three particular clothing labels that were exclusive to Casual Corner and should not have been available at FOT. Finally, Ms. Sweeney spotted approximately 100 vests and 2 sweaters that were exclusive Casual Corner merchandise and from which the labels had been removed. Aff. ¶ 4; App., *infra*, 4a, 19a.

On September 27, 1984, FBI agents performed surveillance at FAD and observed a van belonging to FAD being loaded. The agents followed the van to the Milford warehouse, where the driver went inside. The agents then observed several racks of women's clothing inside the warehouse. Aff. ¶ 9.

The evidence at the suppression hearing disclosed that before they appeared before a magistrate, the

agents met with an Assistant United States Attorney for about six hours to discuss and prepare an application for the search warrants. A federal magistrate then reviewed the affidavit and warrant application for about 45 minutes before issuing the warrants. In the course of authorizing the searches, the magistrate did not in any way intimate that the warrants were insufficiently particularized. C.A. App. 68-71, 80-81.[1] Each of the warrants authorized the agents to seize the following property (App., *infra*, 3a):

> "[C]artons of women's clothing, the contents of those cartons, lists identifying the contents of the cartons, and control slips identifying the stores intended to receive these cartons, such items being contraband and evidence of a violation of Title 18, United States Code, Section 659, Possession of Goods Stolen from Interstate Shipments."

On September 28, FBI agents executed the warrants. Accompanying the agents during the searches were managers from Casual Corner stores, whose function was "to identify clothing belonging to their company that should not be for sale outside * * * Women's Specialty Retailing." C.A. App. 72-74. Sometime after the searches began, an agent at the Milford warehouse called Agent Frisoli, who was at FAD, and advised him that the agents had discovered clothing in the warehouse beyond that which had been referred to in the warrant. The agent relayed to Frisoli the identifying numbers on the garments so that Frisoli could determine if this clothing was also stolen. After Frisoli learned that this additional

[1] "C.A. App." refers to petitioner's appendix in the court of appeals.

clothing had been discovered at the warehouse, he searched for similar merchandise at FAD and discovered that identical items were on the premises there. Prior to seizing any of it, Frisoli confirmed that nearly all the goods on the premises had been stolen. The only exceptions were certain sweat shirts; although those items had been sold to FAD, they had not yet been paid for. C.A. App. 76-80, 92.

In all, the agents seized from FAD a large supply of stolen merchandise, including 29 cartons of Casual Corner clothing, 111 Sassoon dresses, 130 men's corduroy sports jackets, and 4 empty boxes with Casual Corner markings. From FOT the agents seized additional stolen apparel, including 200 sweaters, 72 blouses, and 64 pairs of pants. From the Milford warehouse the agents seized a quantity of stolen women's clothing sufficient to fill about 504 cartons, as well as stolen Sassoon skirts and men's corduroy jackets. The agents later returned the sweat shirts they had seized. App., *infra*, 4a-5a; C.A. Supp. App. 1-2, 4-23; C.A. App. 92.[2]

On May 9, 1986, the district court granted respondent's motion to suppress (App., *infra*, 13a-22a). The court held that "the warrants in this case did not meet the particularity requirement of the Fourth Amendment." In addition, the court found that "the government has failed to show that the F.B.I. agents who executed the warrants acted in good faith" (*id.* at 14a).

2. The court of appeals affirmed (App., *infra*, 1a-2a). It first held (*id.* at 7a) that the warrants to search the three premises were insufficiently particularized in that they "substantial[ly] fail[ed] to specify as nearly as possible the distinguishing charac-

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[2] "C.A. Supp. App." refers to respondent's supplemental appendix in the court of appeals.

teristics of the goods to be seized." The court surmised (*id.* at 8a) that the agents "clearly could have obtained specific information for presentment to the magistrate and placement in the warrant which would have enabled the agents executing the FAD and Milford warehouse searches to differentiate contraband cartons of women's clothing from legitimate ones." [3] The court also found (*id.* 9a-10a) that the warrant to search FOT was insufficiently particularized because although Ms. Sweeney had seen particular items at FOT prior to the search, the warrant did not identify those items.

The court next refused (App., *infra*, 10a-12a) to find that the agents had executed the searches in good faith under *United States* v. *Leon*, 468 U.S. 897 (1984). It held, first, that "[t]he good faith exception * * * will not be applied unless the officers executing search warrants, at the very minimum, act within the scope of the warrants and abide by their terms" (App., *infra*, 10a-11a). Because the agents who searched FAD and the warehouse seized some clothing that was not covered by the warrants, it held that the searches at those locations were not performed in good faith (*id.* at 11a). The court also refused to find good faith in connection with the search

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[3] In particular, the court faulted the agents for failing to include in the warrant "information identifying the store that was receiving the goods, including the store number, name and address" (App., *infra*, 9a). The court suggested (*ibid.*) that instead of listing simply "cartons of women's clothing," the warrant could have listed "cartons of women's clothing from Casual Corner stores" (the intended destination of the stolen shipment) or "cartons of women's clothing from Women's Specialty Retailing" (the company from which the shipment was stolen).

at FOT because the agents had failed to take " 'every step that could reasonably be expected of them' " in describing the items to be seized (*ibid.*, quoting *Massachusetts* v. *Sheppard*, 468 U.S. 981, 989 (1984)). The court noted (*ibid.*) that the affidavit for the warrant indicated that mailing labels had been attached to the cartons of clothing before they were stolen; the court held that the agents should have obtained that information and included it in the warrant. Moreover, Ms. Sweeney had seen particular items at FOT prior to the search; the court held that the warrant should have specified this list of merchandise. Because of these omissions, the court held that the warrant was " 'so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid' " (App., *infra*, 11a-12a (quoting *Leon*, 468 U.S. at 923)).

REASONS FOR GRANTING THE PETITION

In *United States* v. *Leon*, 468 U.S. 897, 922 (1984), the Court held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." The court of appeals refused to apply the rule in *Leon* to any of the three searches at issue in this case. With respect to the search at FOT, the court found that the agents did not "take every step that could reasonably be expected of them" in describing the items to be seized (App., *infra*, 11a). The court also refused to apply *Leon* to the searches at FAD and the warehouse, because in executing those searches the agents seized a quantity of items that were outside the scope of the

warrants. The decision below thus raises two issues of considerable and recurring importance concerning the application of the good faith exception in *Leon*.

First, in holding that the agents did not act in good faith because of a lack of particularity in the warrant to search FOT, the court of appeals significantly misread the *Leon* case and effectively held the agents to a standard of near perfection in the drafting of warrants. The court's application of *Leon* in this case is in sharp conflict with the approach followed in other circuits. This case presents an appropriate vehicle to resolve the substantial differences among the circuits in the application of *Leon* to warrants that are found to be insufficiently particularized.

Second, the court of appeals misread *Leon* when it concluded that agents cannot be acting in good faith when some of the items they seize are outside the four corners of the warrant. *Leon* itself imposes no such limitation, nor could it without departing from prior decisions of this Court. Because this aspect of the court of appeals' decision is also contrary to other circuit law, review by this Court is warranted.

1. In the *Leon* case the Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity" (468 U.S. at 919). This is particularly true, the Court added, "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope" (*id.* at 920 (footnote omitted)). The Court reasoned that in such cases the deterrent value of the exclusionary rule is vitiated by the fact that "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that

the form of the warrant is technically sufficient" (*id.* at 921).

The Court noted that there were nevertheless some circumstances in which the executing officer would have "no reasonable grounds for believing that the warrant was properly issued" (468 U.S. at 923). In those unusual cases "[s]uppression * * * remains an appropriate remedy" (*ibid.*). In particular, the Court stated that suppression could be ordered in cases in which the agent misled the magistrate with known false information; cases in which the magistrate "wholly abandoned his judicial role"; cases in which probable cause was "so lacking * * * as to render official belief in its existence entirely unreasonable" (citation omitted); and, finally, cases in which "a warrant may be so facially deficient—*i.e.*, in failing to particularize the * * * things to be seized—that the executing officers cannot reasonably presume it to be valid" (*ibid.*). The selection of these examples, we submit, makes it clear that when an agent secures a search warrant, suppression is appropriate only when the magistrate or agent has wholly abdicated his professional responsibilities. In such instances, the exclusionary rule "bear[s] [its] heavy burden of justification" and "pay[s] its way by deterring official lawlessness." *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (quoted in *Leon*, 468 U.S. at 907-908 n.6).

The simple failure to take every reasonable step to particularize a warrant cannot amount to the kind of default that justifies the heavy hand of suppression. The Court's recent decision in *Illinois* v. *Krull*, No. 85-608 (Mar. 9, 1987), makes that point clearly. In that case, the Court held that the *Leon* exception applies to a seizure undertaken pursuant to a statute

that was later declared unconstitutional. The Court rejected the argument (slip op. 18-19) that the statute vested so much discretion in the seizing officer that the officer could not reasonably suppose the statute to be valid. Although the Court noted certain additional restrictions on the officer's discretion that might have been put into the statute, it held that these alterations in the statute were "not so obvious that an objectively reasonable police officer would have realized the statute was unconstitutional without them" (slip op. 19 (footnote omitted)). The officer's reliance on the statute, even without the additional safeguards, was thus "in objective good faith" (*ibid.*).

In the present case, the court of appeals upheld the suppression order because, in the court's view, the agents did not take every reasonable step to narrow the warrants. Even if such an exacting standard were otherwise appropriate under *Leon*, we believe that the court of appeals' quarrel with the warrants in this case was unjustified.

To be sure, the warrants in this case were broad in scope. But it is difficult to imagine how the warrants could have been drafted more narrowly without imposing inappropriate limitations on the items to be seized. The court of appeals made two suggestions as to how the warrants could have been more narrowly drafted, but both of those suggestions were plainly flawed. The court first suggested (App., *infra*, 11a) that the warrants should have included the mailing labels that had been attached to the cartons of women's clothing before they were stolen. The affidavit in this case, however, disclosed that the labels on some of the clothes had been removed prior to the search, and the agents had every right to infer that the mailing slips would have been removed as

well.[4] The court next suggested that the warrant to search FOT should have listed the items observed by Ms. Sweeney. That suggestion also misses the mark. Ms. Sweeney saw those items in a 10- or 15-minute visit to the store; there was every reason to anticipate that additional stolen merchandise would be found there as well. There was no reason to limit the warrant to the specific items that Ms. Sweeney observed, even if those items could have been identified with the precision that the court of appeals seems to have expected.

The agents in this case thus faced a dilemma. A narrowly drafted warrant, along the lines suggested by the court of appeals, might well have omitted much, if not all, of the stolen property that the agents clearly had probable cause to seize. On the other hand, a broadly worded warrant was vulnerable to attack if a defendant or a court could subsequently devise a formula that would describe all the property for which the agents had probable cause, yet define that category more narrowly than the warrants in this case. In light of the court of appeals' failure to suggest how the warrants might properly be narrowed without omitting a potentially large portion of the stolen goods, the magistrate can hardly be faulted for having selected the language that was used in the warrants, even though that language was broad. And for the same reason, the agents surely cannot be criticized for having concluded that the formula approved by the magistrate satisfied the requirements of the Fourth Amendment.

Even if the agents were held to a high standard of familiarity with the technical features of search and

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[4] The mailing slips would, of course, have made it crystal clear to anyone who saw them that the merchandise was stolen.

seizure law, it would have been reasonable for them to believe that the warrants in this case were sufficiently particularized. In *United States* v. *Scharfman*, 448 F.2d 1352 (1971), cert. denied, 405 U.S. 919 (1972), the Second Circuit approved a virtually indistinguishable warrant that was issued under nearly identical circumstances. In *Scharfman* a truck loaded with several hundred furs was hijacked. Thereafter, an informant advised the FBI that furs from that shipment could be found in the defendant's stores. An employee of one of the shippers confirmed this tip by identifying one fur at one of the defendant's stores as part of the stolen shipment. The court of appeals upheld a warrant that authorized the agents to search for and seize "fur coats, stoles, jackets and other finished fur products" (448 F.2d at 1353 n.1). The court rejected the claim that the warrant was insufficiently particularized. It held (*id.* at 1354 (citation omitted)) that "[w]here goods are of a common nature and not unique there is no obligation to show that the ones sought * * * necessarily are the ones stolen, but only to show the circumstances indicating this to be likely." [5] To insist on greater specificity in the warrant, the court reasoned, would reward the defendant for his own stealth. "[I]t is inconceivable that by mixing legitimately obtained [goods] with the stolen merchandise so as to make them virtually indistinguishable, the defendant could invalidate the seizure because more specificity has become impossible" (*id.* at 1354 n.3).

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[5] The court noted (448 F.2d at 1354) that "if the searching agents entered a specified location with thousands of garments on the premises but the warrant itemized only a few hundred which had been allegedly stolen, the task of identifying and seizing the specific garments would have required a legion of fur experts to perform the task in a reasonable period."

In light of the judicial approval of the warrant in *Scharfman*, the agents in this case had even less reason to second-guess the magistrate's judgment that the warrants to search respondent's premises were sufficiently narrow.[6] See *Illinois* v. *Krull*, slip op. 18-19 & n.16 (fact that Supreme Court of Indiana approved a similar statute was evidence that officer's reliance upon the Illinois statute was reasonable). Cf. *Leon*, 468 U.S. at 919-920 n.20 ("The objective standard we adopt * * * requires officers to have a reasonable knowledge of what the law prohibits."). More generally, however, the court of appeals' insistence that the agents take every reasonable step to narrow the warrant breaks faith with *Leon* by requiring the agents to exercise a degree of drafting skill bordering on perfection. The court's approach overlooks the often complex and technical nature of the particularity requirement. Whether a warrant is sufficiently particular depends upon the relationship between the probable cause stated in the affidavit and the description in the warrant of the items to be seized. In any given case, a question can always be raised whether the "fit" between the probable cause and the warrant is sufficiently close. That is the kind of judgment that agents are not trained to make and on which they have every right to defer to the magistrate's decision to issue the warrant.

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[6] In fact, in three of its prior decisions, the First Circuit had cited the *Scharfman* case as an example of a sufficiently particularized warrant. See *United States* v. *Cortellesso*, 601 F.2d 28, 31 (1979), cert. denied, 444 U.S. 1072 (1980); *Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F.2d 324, 326 (1978); *United States* v. *Klein*, 565 F.2d 183, 187-188 (1977).

2. The First Circuit's application of the good faith exception to warrants lacking sufficient particularity is in conflict with the decisions of several other circuits. The Second Circuit considered this issue in its recent decision in *United States* v. *Buck*, No. 86-1500 (Mar. 10, 1987). In the course of investigating an armored car robbery in that case, agents traced the get-away car to a house in New Jersey and secured a warrant to search the house for "any papers, things or property of any kind relating to [the] previously described crime" (slip op. 1803). The court of appeals held that the warrant was insufficiently particularized in that the agents "clearly did not insure that all the known facts were included in the warrant" (*id.* at 1808). Nevertheless, expressly noting that its holding was in conflict with decisions of the First Circuit in this case and the Ninth Circuit in another case (*id.* at 1809-1810 n.1), the court of appeals found that the agents had acted in good faith under *Leon*. The court noted (*id.* at 1810) that the "officers in this case made considerable efforts to comply with the dictates of the Fourth Amendment." [7] All the officers failed to do, the court held, was to anticipate the court's ruling that "the use of a catch-all description in a search warrant, unaccompanied by any list of particular items" would be insufficient (*ibid.*). But that failure did not constitute bad faith

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[7] In particular, the Second Circuit noted (*United States* v. *Buck*, slip op. 1810) that the agents had "sought out a neutral magistrate; * * * tape-recorded the conversation with the magistrate to assure accuracy; * * * outlined the crime for the magistrate; * * * described the evidence that led them to the house in East Orange; [and] the detective was placed under oath by [the magistrate] and swore to the truth of his assertions."

because "the law was unsettled" on this issue and "a reasonably well-trained police officer could not be expected to know that the warrant issued by [the magistrate] violated the Fourth Amendment" (*ibid.*). The court accordingly held (*id.* at 1810-1811) that "[t]he exclusionary rule's deterrent function is not served by penalizing officers who rely upon the objectively reasonable legal conclusions of an issuing judge."

The application of *Leon* by the First Circuit is also at odds with the approach adopted by the Eleventh Circuit in *United States* v. *Accardo*, 749 F.2d 1477 (1985), cert. denied, No. 85-518 (Nov. 4, 1985).[8] There, the court of appeals vacated a district court order suppressing evidence because of a warrant's lack of particularity. The Eleventh Circuit held that on the facts presented at the suppression hearing, good faith had been established. The agents "submitted a detailed affidavit to a magistrate," and that affidavit alleged "a pervasive fraud" that "justif[ied] a more flexible reading of the fourth amendment particularity requirement" (749 F.2d at 1480-1481). Moreover, the affidavit "was reviewed by several attorneys in the U.S. Attorney's office," and the magistrate "found probable cause and issued the warrants" (*id.* at 1480).[9] See also *United States* v. *Weinstein*, 762 F.2d 1522 (11th Cir. 1985), cert. denied, No. 85-1508 (Apr. 7, 1986) (applying a good

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[8] The Second Circuit noted this conflict with the Eleventh Circuit in its decision in the *Buck* case. See slip op. 1809-1810 n.1.

[9] Because the district court had not expressly considered the issue of good faith, the court of appeals remanded for further proceedings to consider any other evidence that might bear on the good faith issue.

faith standard to a search warrant challenged as overbroad).

The Eighth Circuit's decision in *United States* v. *Faul*, 748 F.2d 1204 (1984), cert. denied, 472 U.S. 1027 (1985), is also contrary to the approach employed by the First Circuit. *Faul* involved an exchange of gunfire between United States marshals and a group of suspects. After the exchange, a warrant issued to seize from the farmstead of one of the suspects "any and all firearms, ammunition, grenades, crossbows, rocket launchers and other explosive devices." The defendants claimed that this category was overbroad. The court of appeals disagreed, noting that "[a]rguably, all of the firearms seized were relevant until ballistics examinations had been performed" (748 F.2d at 1219). In any event, the court held, the seizure would be justified under *Leon*. *Id.* at 1220 n.11. Although, under the First Circuit's test, the agents undoubtedly could have narrowed the scope of the warrant—based on the kinds of weapons used at the shoot-out—the court of appeals held that *Leon* did not impose so rigid a requirement.

Finally, in the Ninth Circuit's most recent decision in this area, that court appears also to depart from the application of *Leon* adopted by the First Circuit in the present case. *United States* v. *Michaelian*, 803 F.2d 1042 (1986). The *Michaelian* case involved a search for records reflecting a violation of the tax laws for certain specific years. Like the First Circuit in this case, the district court had found the warrants to be too general "in light of the lengthy IRS investigation and detailed knowledge provided [to the agents by certain informants]" (803 F.2d at 1046 n.1). The court of appeals did not challenge this judgment, holding instead that the seizure was made in good faith. The court noted (*id.* at 1047) that the

warrants did not "approximate the degree of facial deficiency which would preclude objective reliance by federal agents." The records to be seized were limited to particular years and the categories of records to be seized were not unlimited. Moreover, the warrants were subjected to "four levels of attorney review." *Ibid.* Thus, although the warrants undoubtedly could have been made more specific (as the district court found, in a ruling not disturbed by the court of appeals), the Ninth Circuit upheld the seizure on good faith grounds.[10]

3. The fact that the agents seized certain items that were outside the terms of the warrant did not justify the court of appeals in finding an absence of good faith. In the first place, we do not see how the agents' decision to seize items that were in plain view can possibly bear on the question whether the terms of the warrants were sufficiently narrow. Although the court of appeals purported to base its contrary decision on the language of the *Leon* decision, there is nothing in that case to support the court of appeals' position.[11] Moreover, it is well established that if

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[10] On the other hand, in three other cases the Ninth Circuit refused to find good faith in the context of warrants that it held to be insufficiently particularized. See *United States* v. *Spilotro*, 800 F.2d 959 (1986); *United States* v. *Washington*, 797 F.2d 1461 (1986); and *United States* v. *Crozier*, 777 F.2d 1376 (1985).

[11] The court of appeals found support in *Leon* only by quoting a portion of that opinion out of context. The court of appeals stated (App., *infra*, 11a (emphasis added) (quoting 468 U.S. at 918 n.19)) that the "*good faith exception* 'assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant.'" But this Court did not say in *Leon* that "the good faith exception" depended on that assumption; rather, what turned on that

agents who are executing a search warrant encounter contraband or stolen property in plain view, they may lawfully seize that property. See, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-467 (1971); *United States* v. *Ellison*, 793 F.2d 942, 948 (8th Cir. 1986), cert. denied, No. 86-5484 (Nov. 3, 1986); *United States* v. *Fawole*, 785 F.2d 1141, 1145 (4th Cir. 1986). In any event, even when agents have improperly seized items that are not within the terms of a warrant, the appropriate remedy is to suppress only those items, and not the items that are within the scope of the warrant. See *Waller* v. *Georgia*, 467 U.S. 39, 43-44 n.3 (1984); *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). See also *United States* v. *Offices Known As 50 State Distributing Co.*, 708 F.2d 1371, 1376 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Wuagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

The court of appeals' belief that the seizure of some items in plain view precludes a finding of good faith is in conflict with the decision of the Tenth Circuit in *United States* v. *Medlin*, 798 F.2d 407 (1986). Rejecting the analysis applied by the First Circuit, the court of appeals in *Medlin* held (798 F.2d at 411)

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assumption was the Court's "discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant" (468 U.S. at 918 n.19). The Court made clear that the deterrence benefits of the exclusionary rule are "particularly" lacking "when an officer acting with objective good faith has obtained a search warrant * * * and acted within its scope" (468 U.S. at 920 (footnote omitted)). The Court did not say that deterrence would somehow become well served if those same agents seized some items in plain view, in addition to seizing a quantity of merchandise in objective good faith reliance on a search warrant.

that unless a seizure outside the scope of the warrant reflects a "flagrant disregard for the limitations of a search warrant," the items seized under the warrant in good faith may be severed from the rest and offered into evidence. The decision of the First Circuit in this case therefore conflicts with the approach employed by other circuits in applying this Court's decision in *Leon*, both by insisting on a precise description of the items to be seized and by gauging the reasonableness of the description of the items in the warrant according to the agents' conduct in subsequently executing the search.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1577

UNITED STATES OF AMERICA, APPELLANT

v.

CARL A. FUCCILLO, DEFENDANT, APPELLEE

Appeal from the United States District Court
for the District of Massachusetts

[Hon. Andrew A. Caffrey, *U.S. District Judge*]

January 9, 1987

Before

Campbell, *Chief Judge*,

Timbers,* *Senior Circuit Judge*,

and Breyer, *Circuit Judge*.

TIMBERS, *Circuit Judge*:

The United States ("government") appeals from an order entered May 9, 1986 in the District of Massachusetts, Andrew A. Caffrey, *Chief Judge*, granting the motion of Carl A. Fuccillo ("appellee") to suppress all articles of clothing and other articles seized during the execution on September 28, 1984 of three search warrants at premises owned by appellee. The court held that the warrants were constitutionally deficient in their failure to describe the goods to be seized with sufficient particularity, as required by the Fourth Amendment. The court held, further, that the "good faith" exception to the exclusionary rule, as delineated in *United States* v. *Leon*, 468 U.S. 897 (1984), was inapplicable to the instant case because the agents had not acted in good faith within the meaning of *Leon*.

On appeal, the government argues that the description set forth in the warrants was sufficiently particular to pass constitutional muster. In the alternative, the government asserts that, even if the description was overly broad, the remedy of suppression is not justified because the agents' actions were objectively reasonable and taken in good faith. We hold that the warrants in question did not meet the particularity

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* Of the Second Circuit, sitting by designation.

requirements of the Fourth Amendment. We also hold that suppression of the evidence seized was appropriate and decline the government's invitation to apply the good faith exception to the Fourth Amendment exclusionary rule.

We affirm.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

On September 28, 1984, Federal Bureau of Investigation ("FBI") agents executed three separate, but identical, search warrants which authorized the seizure of:

> "[C]artons of women's clothing, the contents of those cartons, lists identifying the contents of the cartons, and control slips identifying the stores intended to receive these cartons, such items being contraband and evidence of a violation of Title 18, United States Code, Section 659, Possession of Goods Stolen from Interstate Shipments."

The premises which were searched were: (1) Fashion Apparel Distributors ("FAD"), a wholesale distributor located in Revere, Massachusetts; (2) a warehouse in Milford, Massachusetts ("Milford warehouse"); and (3) a retail clothing store located in downtown Boston, known as Fashions on Tremont ("FOT"). All three premises are owned by appellee.

In issuing the three warrants, the magistrate relied exclusively on a single affidavit submitted by FBI Agent Frisoli. The affidavit stated that two trailers containing 839 cartons of women's clothing, with an approximate value of $500,000, had been stolen from

Women's Specialty Retailing of Enfield, Connecticut, sometime between August 10 and 13, 1984. Attached to the cartons of clothing were shipping slips which contained information concerning the stores which were to receive the goods, including the store name, address and number. The affidavit stated that Casual Corner stores were among the stores which were to receive the cartons of women's clothing.

The affidavit further stated that on September 25, 1984 a confidential informant had advised Frisoli that stolen women's clothing would be found at FAD, FOT and the Milford warehouse; that "it" had been inside the Milford warehouse and FAD; and that while inside these premises "it" had observed Casual Corner women's clothing which "it" knew to be stolen.

The affidavit next related that an FBI agent, accompanied by a Casual Corner store manager, visited FOT on September 26, 1984. The Casual Corner manager, after spending approximately fifteen minutes inside FOT, informed the FBI agent that she had observed the following clothes for sale at FOT, which she stated were manufactured exclusively for Casual Corner stores and should not have been offered for sale elsewhere: eight Newsport skirts, twelve Jenniffer blouses and twelve Organically Grown sweaters. She further informed the FBI agent that she had observed one hundred Jennifer Reed cotton knit vests and two down angora vests, which, although their labels had been removed, she positively identified as having been made for Casual Corner.

On September 28, 1984 the warrants were executed by three separate teams of FBI agents. Seized from

FAD were twenty-nine cartons of Casual Corner women's clothing, one hundred and eleven Sassoon dresses, one hundred and thirty men's corduroy sport jackets, and four empty boxes with Casual Corner markings. Prior to the search of the Milford warehouse, while appellee was present, the FBI agent in charge asked appellee to identify which, if any, of the goods "were legitimate." When appellee declined to reply, the agents seized the entire contents of the Milford warhouse. Empty cartons, papers and receipts also were confiscated from the Milford warehouse. At FOT, apparel was removed from clothing racks and placed in approximately seven bags, which then were seized.

On January 22, 1986, appellee was indicted by a grand jury and charged with one count of receipt of stolen goods in interstate commerce, in violation of 18 U.S.C. § 2315 (1982); one count of interstate transportation of stolen goods, in violation of 18 U.S.C. § 2314 (1982); and four counts of possession of goods stolen from interstate shipment, in violation of 18 U.S.C. § 659 (1982). The indictment was based in part on the evidence seized from the three premises owned by appellee. On February 28, 1986 appellee moved to suppress all evidence seized. A hearing was held before Chief Judge Caffrey on March 3, 1986. On May 9, 1986 Chief Judge Caffrey filed a memorandum and order granting appellee's motion to suppress. On June 5, 1986 the government took the instant appeal pursuant to 18 U.S.C. § 3731 (1982).

For the reasons stated below, we affirm the order of the district court suppressing the evidence seized from FAD, the Milford warehouse and FOT.

II.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized". Thus general warrants are prohibited by the Bill of Rights. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . ." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). In requiring a particular description of articles to be seized, the Fourth Amendment " 'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965) (*quoting Marron* v. *United States*, 275 U.S. 192, 196 (1927)).

We recognize, however, that the overriding principle of the Fourth Amendment is one of reasonableness and on occasion have accepted general descriptions in warrants, holding that such descriptions are not always constitutionally infirm. *E.g.*, *United States* v. *Cortellesso*, 601 F.2d 28 (1st Cir. 1979) (general description upheld due to practical impossibility of precise description); *Vitali* v. *United States*, 383 F.2d 121 (1st Cir. 1967) (general description permissible due to common nature and non-uniqueness of items to be seized). Such general descriptions are permissible only in "special contexts in which there [is] substantial evidence to support the belief that the class of contraband [is] on the premises and in practical terms the goods to be described [can] not be precisely described." *Montilla Records*

of Puerto Rico v. *Morales*, 575 F.2d 324, 326 (1st Cir. 1978). In *United States* v. *Klein*, 565 F.2d 183 (1st Cir. 1977), we set forth two tests which in particular circumstances may help to illuminate whether this principle is satisfied: first, the degree to which the evidence presented to the magistrate establishes reason to believe that a large collection of similar contraband is present on the premises to be searched, and, second, the extent to which, in view of the possibilities, the warrant distinguishes, or provides the executing agents with criteria for distinguishing, the contraband from the rest of an individual's possessions. In this case, we hold, with respect to all three sets of seizures, that the warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.

A.

We begin with the seizure of clothing, papers and boxes from FAD and the Milford warehouse.

The instant warrants contained no explanation as to how the executing agents were to differentiate cartons of stolen women's clothing from legitimate goods at either location. This failure was held to be fatal in both *Klein*, *supra*, 565 F.2d at 188-190 and *Montilla Records*, *supra*, 575 F.2d at 326—especially in view of the fact that the defects could have been cured had the warrants in both cases set forth information clearly available to the government for distinguishing the contraband. As indicated below, we are faced with a like situation in the instant case.

In *Klein*, we held invalid a mass seizure of tapes and tape cartridges under a warrant authorizing the seizure of "unauthorized 'pirate' reproductions". We

did so because information detailing the background and expertise of the agent in the field of detecting pirate tapes, indicia of illegality such as crudeness of tape jackets, obscurity of recording company names, and the like, while available to the government, was not presented to the magistrate prior to the issuance of the warrant. "In light of the information available to the agents which could have served to narrow the scope of the warrant and protect the defendants' personal rights, the warrant was inadequate." *Klein*, 565 F.2d at 190.

In *Montilla Records*, the only product which the affidavit suggested was illegally manufactured was Motown records, easily differentiated from the entire inventory by their labels. And yet the warrant did nothing more than direct the agents to seize all "unauthorized or illegal recordings." We refused to uphold the seizure:

> "In sum, were this seizure to be upheld, we would signal a rule allowing general warrants with only generic descriptions to issue solely on evidence that particular and easily differentiated contraband of that generic class was to be found on the premises to be searched. This would be an unnecessary and dangerous dilution of search warrant requirements."

Montilla Records, 575 F.2d at 327.

In the instant case the FBI clearly could have obtained specific information for presentment to the magistrate and placement in the warrant which would have enabled the agents executing the FAD and Milford warehouse searches to differentiate contraband cartons of women's clothing from legitimate ones. Although the affidavit stated that attached to

the stolen cartons was "information identifying the store that was receiving the goods, including the store number, name and address", apparently no effort was made by the agents to obtain this information from Women's Specialty Retailing and include it in the warrant. The warrant, directing the agents to seize "cartons of women's clothing" instead could have directed the agents to "cartons of women's clothing from Casual Corner stores" or "cartons from Women's Specialty Retailing." As in *Montilla Records*, the executing agents in the instant case had no "physical criteria or detailed description in the warrant to enable them to determine what they might lawfully seize. . . ." *Montilla Records, supra*, 575 F.2d at 326-327. As a result, "[i]t is obvious from the conduct of the agents who participated in the search[es] that they did not consider their authority to be limited. . . ." *Id.* at 326. With no guidance in the warrants, the agents seized racks of women's clothing, racks of men's clothing, bins of clothing, papers and receipts. Indeed, they removed the *entire contents* of the Milford warehouse.

We hold that the government failed to meet the standards required by *Klein* and *Montilla Records*.

B.

As for the seizure of clothing from FOT, we hold that, in view of the information available to the FBI and the magistrate prior to the issuance of the warrant, the general description found in this warrant renders it constitutionally unacceptable.

It is beyond cavil that the warrant for the search of FOT could have been written with precision to assure that appellee's personal rights would remain inviolate. The Casual Corner store manager had

given the FBI a very detailed list of articles she had observed at FOT. They were manufactured exclusively for Casual Corner stores. Instead of identifying these articles of clothing with specificity, thus limiting the scope of the seizure, the warrant merely directed the agents to search, and seize, indiscriminately. In light of our holding that the warrant issued by the magistrate for the search of FOT was so glaringly deficient, we find it neither necessary nor appropriate to scrutinize the warrant any further.

C.

The government argues that, even if the three search warrants were constitutionally inadequate because of their failure to specify the goods to be seized with sufficient particularity, the district court erred in refusing to apply the good faith exception to the exclusionary rule enunciated in *United States* v. *Leon*, 468 U.S. 897 (1984). We disagree.

In *Leon*, the Supreme Court reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. The Court concluded that the purpose of the rule only rarely would be served by applying it in such circumstances. Accordingly, the modification known as the good faith exception to the exclusionary rule was created. This good faith exception, however, is grounded in an objective standard of reasonableness. As a result, an officer is required to have a "reasonable knowledge of what the law prohibits." *Id.* at 920, n.20. The good faith exception, therefore, will not be applied unless the officers executing search

warrants, at the very minimum, act within the scope of the warrants and abide by their terms.

Applying these principles to the searches and seizures at FAD and the Milford warehouse, it is clear to us that the agents executing the warrants did not act in good faith as that term was explained in *Leon*. Armed with warrants already drawn in the broadest manner, the agents exceeded even that authority. In executing the search warrant at FAD, the agents seized, in addition to the authorized cartons of *women's* clothing, racks of clothing, empty boxes, and, most disturbingly, two racks of *men's* clothing. The *entire contents* of the Milford warehouse were seized. The good faith exception "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Id.* at 918 n.19. In view of the facts before us, we cannot make that assumption. We decline, therefore, to apply the good faith exception.

Suppression is still an appropriate remedy when "the officers were . . . reckless in preparing their affidavit. . . ." *Id.* at 926. We hold that, with regard to the affidavit prepared for the warrant authorizing the search of FOT, and the warrant itself, the agents were reckless in not including in the affidavit information which was known or easily accessible to them. The agents here simply did not "take every step that could reasonably be expected of them". *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). The affidavit contained statements which indicated that the cartons of stolen clothing could have been identified easily through mailing labels attached to the cartons; yet the agents took no steps to obtain the information disclosed on those labels. The affi-

davit stated that the Casual Corner manager had given, with much specificity, a list of clothing she had observed while at FOT which she knew was manufactured exclusively for Casual Corner; yet no where in the warrant does this list appear. "[A] warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Leon*, *supra*, 468 U.S. at 923. This is just such a warrant.

We hold that the district court correctly declined to apply the good faith exception.

III.

To summarize:

We affirm the order of the district court suppressing the evidence seized from FAD, the Milford warehouse, and FOT. We hold that the warrants authorizing the three searches were constitutionally impermissible in their failure to satisfy the particularity requirements of the Fourth Amendment. We also hold that the good faith exception to the Fourth Amendment exclusionary rule properly was not applied by the district court in the instant case because the FBI agents did not act with objective good faith within the meaning of *United States* v. *Leon*, 468 U.S. 897 (1984).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 86-00019-C

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARL A. FUCCILLO, DEFENDANT

May 9, 1986

MEMORANDUM

CAFFREY, CH. J.

This is a criminal action in which the defendant Carl A. Fuccillo has been charged with one count of receiving stolen goods in interstate commerce under 18 U.S.C. § 2315, four counts of possession of goods stolen from interstate shipment under 18 U.S.C. § 659, and one count of interstate transportation of stolen goods under 18 U.S.C. § 2314. The matter is now before the Court on the defendant's motion to suppress all articles seized during the execution of three search warrants on September 28, 1984.

As grounds for his motion to suppress, the defendant contends that the searches were executed in violation of his rights under the Fourth Amendment of the United States Constitution. More specifically, the

defendant maintains that the affidavit of F.B.I. Agent Frisoli, relied upon by the Magistrate issuing the warrants, did not support a finding of probable cause, and that the warrants failed to specify the articles to be seized with sufficient particularity. The defendant further maintains that Agent Frisoli and the other F.B.I. agents who executed the warrants did not act in objectively reasonable reliance upon the warrants and, accordingly, the good faith exception to the exclusionary rule established by the United States Supreme Court in *United States v. Leon*, 104 S.Ct. 3405 (1984), does not apply. For the reasons set forth below, I rule that the warrants in this case did not meet the particularity requirement of the Fourth Amendment, and I further rule that the government has failed to show that the F.B.I. agents who executed the warrants acted in good faith.[1]

After hearing, I find and rule that on September 28, 1984 F.B.I. agents executed three separate search warrants for the following premises: 1) a one-story red brick building housing Fashion Apparel Distributors ("FAD"), a wholesale distributor located at 191 Revere Street, Revere, Massachusetts; 2) a one-story beige brick building, housing a warehouse, located at 5 Fayette Street, Milford, Massachusetts;

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[1] Because I rule that the search warrants fail to meet the particularity requirement of the Fourth Amendment, it is unnecessary to determine whether Agent Frisoli's affidavit was sufficient to establish probable cause. The Court notes, however, that the affidavit, particularly with respect to the Milford and Revere premises, was based principally upon information supplied by a confidential informant whose "reliability," "veracity," and "basis of knowledge" were not addressed in the affidavit. *Illinois v. Gates*, 461 U.S. 213, 230 (1983).

and 3) Fashions on Tremont, a retail store located on the first floor of 151 Tremont Street, Boston, Massachusetts. Each of the three warrants authorized the seizure of "cartons of women's clothing, the contents of those cartons, lists identifying the contents of the cartons, and control slips identifying the stores intended to receive these cartons, such items being contraband and evidence of a violation of Title 18, United States Code, Section 7659 [*sic*], Possession of Goods Stolen from Interstate Shipments."

In issuing the warrants, the Magistrate relied exclusively upon an affidavit submitted by F.B.I. Agent Lawrence Frisoli.[2] The affidavit related that two trailers containing 839 cartons of women's apparel and accessories were stolen between August 10-13, 1984 from Women's Specialty Retailing in Enfield, Connecticut. Information identifying the stores that were to receive the goods, including the store numbers, names, and addresses, were attached to the cartons. Agent Frisoli's affidavit further stated that the stores that were to receive the cartons of women's clothing "were among others Casual Corner." Most of the other information in the affidavit was provided by a confidential informant. The affidavit states that the informant advised Agent Frisoli that stolen women's clothing was located at FAD in Reverse, the Milford warehouse, and Fashions on Tremont in Boston, that "it" had been inside FAD and the Milford warehouse, and that while inside these premises, "it" had observed Casual Corner women's clothing which "it" knew to be stolen.

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[2] Agent Frisoli's affidavit is set forth in its entirety in the appendix. Only those parts of the affidavit that relate to the issues of the specificity of the warrants and the good faith of the agents will be discussed.

Defendant Fuccillo contends that none of the warrants in this case specified the goods to be seized with sufficient particularity. The United States Supreme Court has explained that the particularity requirement "makes general searches under [warrants] impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927); *See also, Montilla Records of Puerto Rico, Inc. v. Morales*, 575 F.2d 324, 326 (1st Cir. 1978). The warrants at issue in this case did not specify what types or brands of clothing were subject to seizure, but instead referred only to "cartons of women's clothing." Such a broad description is not necessarily fatal to the warrants. The Court of Appeals for the First Circuit has held that warrants which provide only a generic description of the goods to be seized may in some instances satisfy the particularity requirement. *United States v. Cortellesso*, 601 F.2d 28 (1st Cir. 1979); *United States v. Klein*, 565 F.2d 183 (1st Cir. 1977). While it is true that in certain cases a warrant which provides merely a generic description of the goods to be seized may be adequate, for the reasons stated below, I rule that the description of the goods to be seized in the three different warrants in this case fail to satisfy the particularity requirement of the Fourth Amendment.

The Court of Appeals for the First Circuit has established two similar but significantly different tests both of which must be met before a Magistrate may issue a valid warrant providing only a generic description of the goods to be seized: first, whether the evidence presented to the Magistrate established that there was reason to believe that a large collec-

tion of similar contraband was present on the premises to be searched; and second, whether the evidence before the Magistrate explained the method by which the executing agents were to distinguish between contraband and the rest of the defendant's inventory. *United States v. Cortellesso*, 601 F.2d 28, 31 (1st Cir. 1979); *United States v. Klein*, 565 F.2d 183, 188 (1st Cir. 1977). With respect to the requirement that there be reason to believe that a large collection of similar contraband was present on the premises, the Court of Appeals has said that "there must be specific and detailed foundation for such a belief." *Klein*, 565 F.2d at 188. There was no specific and detailed foundation for a belief that a large collection of stolen women's clothing in cartons was present at the FAD premises in Revere or the Milford warehouse. Agent Frisoli's affidavit stated that a confidential informant knew that stolen women's clothing was present at FAD and the Milford warehouse and that the informant personally observed stolen Casual Corner clothing at both locations. This information, when considered in light of the fact that 839 cartons of women's clothing, including cartons headed for Casual Corner stores, were previously stolen in Connecticut, arguably supports the inference that some of the 839 stolen cartons were in FAD and the Milford warehouse. Nonetheless, I rule that the information in the affidavit does not provide a sufficient specific and detailed foundation for the belief that a large number of stolen cartons of women's clothing were present at the three locations. There is no information as to how much stolen clothing was at FAD or the Milford warehouse. Moreover, there is no information whatsoever in the affidavit that any *cartons* of women's clothing were at FAD or the Milford warehouse. In fact, Agent Frisoli's affidavit

reveals that two F.B.I. agents observed through an open garage door at the Milford warehouse "several racks of hanging women's clothing."

The government has also failed to show that the evidence before the Magistrate, which again consisted only of Agent Frisoli's affidavit, explained the method by which the executing agents were to differentiate contraband from legitimate goods at FAD or the Milford warehouse.[3] Moreover, unlike the facts in *Cortellesso* where it was apparent from the affidavit that "for all practical purposes the collection [of stolen goods] could not be precisely described for the purpose of limiting the scope of the seizure," *Cortellesso*, 601 F.2d at 32, the F.B.I. in the instant case could have learned and presented to the issuing Magistrate specific information which would have enabled the agents executing the warrants to differentiate contraband cartons from legitimate ones. Agent Frisoli's affidavit expressly stated that attached to the 839 stolen cartons was "information identifying the store that was receiving the goods, including the store number, store name, and address." The government has made no showing that this information could not have been obtained from Women's Specialty Retailing in Connecticut or from someone else. In summary, I rule that in light of the information available to the agents which could have served to narrow the scope of the warrant and pro-

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[3] In both *Klein* and *Montilla Records*, the principal reason for suppression was that the warrants failed to give the executing agents available information which would have enabled them to distinguish between contraband and legitimate goods. *Klein*, 565 F.2d 188-190; *Montilla Records*, 575 F.2d at 326. In *Klein*, both the warrant and the affidavit were considered on this issue because the warrant expressly incorporated the affidavit. *Klein*, 565 F.2d at 186 n.3.

tect the defendant's personal rights, the warrants were inadequate. *See Klein*, 565 F.2d at 190.

The warrant authorizing the search of Fashions on Tremont is also constitutionally deficient for failure to specify the goods to be seized with sufficient particularity. In light of the information which Agent Frisoli's affidavit reveals was available to the F.B.I. and the Magistrate, a generic description in the warrant of the goods to be seized was clearly inadequate. In *Cortellesso*, the Court of Appeals for the First Circuit said that where a warrant contains only a generic description of the goods to be seized, it is proper for a court to look at the affidavit submitted in support of the warrant to determine whether the use of a generic description in the warrant was adequate. *Cortellesso*, 601 F.2d at 32. In addition to stating that there was information attached to the 839 stolen cartons of women's clothing identifying the number, names, and addresses of stores that were to receive the cartons, Agent Frisoli's affidavit stated that on September 26, 1984 F.B.I. Special Agent Denise Shea Doherty and Anne Sweeney, the manager of a Casual Corner store located in Burlington, Massachusetts, visited Fashions on Tremont. The affidavit further stated that while at Fashions on Tremont Ms. Sweeney observed the following articles of women's clothing which she said were made exclusively for sale by Casual Corner stores: 8 Newsport skirts, 12 Jenniffer blouses, 12 organically grown sweaters, 100 Jennifer Reed cotton knit vests, and 2 dozen down angora sweaters. Therefore, unlike in *Cortellesso*, it cannot be said that "for all practical purposes the collection could not be precisely described for the purpose of limiting the scope

of the seizure." *Cortellesso*, 601 F.2d at 32.[4] Instead of identifying the specific items of clothing observed by Ms. Sweeney, the warrant merely stated that "cartons of women's clothing . . ." were subject to seizure. Significantly, Agent Frisoli's affidavit does not state that Ms. Sweeney observed any *cartons* of women's clothing at all at Fashions on Tremont, nor does the affidavit contain any other first hand information that cartons of women's clothing were located there.

The government argues that even if the three search warrants were constitutionally inadequate for their failure to specify the goods to be seized with sufficient particularity, this Court nevertheless should not suppress evidence seized pursuant to those warrants because at all pertinent times the F.B.I. agents involved in this case acted in good faith. *See United States v. Leon*, 104 S.Ct. 3405 (1984). For the following reasons, I rule that the government has failed to show that in executing each of the three warrants in this case the F.B.I. agents acted in good faith within the meaning of the Supreme Court's decision in *Leon*. The warrants in this case, again, identified the goods to be seized as "cartons of women's clothing, the contents of those cartons, lists identifying the stores intended to receive these cartons . . ." Based upon information which was known or which should have been known to the F.B.I. agents, it was not reasonable for the agents to believe that the search warrant for Fashions on Tremont satisfied the particularity requirement of the Fourth Amendment. Special Agent Frisoli's affidavit reveals that the agents

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[4] In *Cortellesso*, the affidavits revealed that the labels had been removed from the Pierre Cardin suits so that a more precise description would not have assisted the officers in the field and, with respect to other stolen items, only a generic description was known. *Cortellesso*, 601 F.2d at 32.

knew the stolen cartons were identified by store number, store name, and address, yet the government has not shown why the agents did not obtain this information. More importantly, Frisoli's affidavit reveals that Ms. Sweeney of the Burlington Casual Corner store had been inside Fashions on Tremont and had specifically identified a number of articles of women's clothing which were made for sale exclusively by Casual Corner stores. Ms. Sweeney, it should be emphasized, did not see any cartons of Casual Corner women's clothing. For the good faith exception to apply, a law enforcement officer's reliance on "the technical sufficiency of the warrant [a magistrate] issues must be objectively reasonable." *Leon,* 104 S.Ct. at 3421 (1984). This objective standard requires an officer "to have a reasonable knowledge of what the law prohibits." *Id.* at 3420 n.20. In light of the information which was known or, with reasonable effort, could have been known by the F.B.I. agents in this case, the search warrant for Fashions on Tremont was "so facially deficient—i.e., in failing to particularize the . . . things to be seized—that executing officers [could not] reasonably presume it to be valid." *Id.* at 3422.

The government has also failed to show that the F.B.I. agents executing the search warrants for FAD in Revere and the Milford warehouse acted in good faith. In reaching this conclusion, the Court has confined its inquiry to whether "reasonably well-trained officer[s] would have known that the search-[es] [were] illegal despite the magistrate's authorization." *Id.* at 3421 n.23. Although, as has previously been pointed out, the FAD and Milford warrants gave the agents extremely broad authority to seize cartons of women's clothing, in executing those warrants, the agents went beyond that authority.

In addition to taking cartons of women's clothing from the FAD premises in Revere, the agents took a rack containing 111 Sassoon dresses, empty boxes, and, most significantly, one rack of 74 *men's* cotton corduroy blazers and another rack of 56 *men's* cotton corduroy blazers. The agents executing the warrant for the Milford warehouse took the *entire contents* of the warehouse. F.B.I. documentation of the contents taken shows that, in addition to taking cartons of clothing, the agents took bins of clothing, 150 *men's* corduroy sport jackets, a stack of empty cardboard boxes, and racks of clothing. Prior to searching the Milford warehouse, F.B.I. Special Agent Ryall told the defendant Fuccillo that if any of the items located in the warehouse with mailing labels to "F.A.D., 5 Fayette Street, Milford, Massachusetts" were legitimate, Fuccillo should inform the F.B.I. Fuccillo did not respond, and Ryall then told Fuccillo that the entire contents of the warehouse were going to be taken. Language in the Supreme Court's decision in *Leon*, this Court believes, is clear that, as a matter of law, the good faith exception to the exclusionary rule must not be applied unless the officer or officers involved "acted within [the warrant's] scope" or "abided by its terms." *Id.* at 3420, 3421. The Supreme Court further stated in *Leon* that its discussion in that case of "the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Leon*, 104 S.Ct. at 3419 n.19.

Order accordingly.

/s/ Andrew A. Caffrey
ANDREW A. CAFFREY, Ch. J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 86-00019-C

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARL A. FUCCILLO, DEFENDANT

May 9, 1986

ORDER

CAFFREY, CH. J.

In accordance with memorandum filed this date, it is ORDERED:

The defendant's motion to suppress is granted.

/s/ Andrew A. Caffrey
ANDREW A. CAFFREY
Ch. J.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1577

UNITED STATES, APPELLANT

v.

CARL A. FUCCILLO, DEFENDANT, APPELLEE

Entered January 9, 1987

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk.

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Supreme Court, U.S.
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MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1622

In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

Petitioner,

vs.

CARL A. FUCCILLO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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COUNTERSTATEMENT

The Respondent, Carl A. Fuccillo, submits the following Counterstatement to add relevant facts omitted from the Petitioner's Statement and to correct certain inaccuracies.

On September 27, 1984, United States Magistrate Robert J. DeGiacomo issued three search warrants, one for each of the following premises owned by the Respondent: (1) Fashion Apparel Distributors ("FAD"), a wholesale distributor of women's clothing located in Revere, Massachusetts; (2) a warehouse containing primarily women's clothing located in Milford, Massachusetts; and (3) Fashions On Tremont ("FOT"), a retail women's clothing store in Boston. C.A. App. 1-18.

In issuing all three warrants, the Magistrate relied exclusively on a single three and one-half page affidavit, without attachments, which was submitted by Federal Bureau of Investigation ("FBI") Special Agent Lawrence Frisoli. C.A. App. 3-6, 9-12, 15-18. According to the affidavit, two trailers containing eight hundred and thirty-nine cartons of women's clothing were stolen during August of 1984 from Women's Specialty Retailing in Enfield, Connecticut. Many of the stolen cartons were originally destined for delivery to Casual Corner stores. Delivery slips were attached to the cartons identifying particular store numbers, store names and store addresses. C.A. App. 3, 9, 15; App. 3a-4a; 15a.

The affidavit included uncorroborated information from an unidentified informant, who had advised Agent Frisoli that "stolen women's clothing" was located at

the Revere, Milford and Boston locations. Also, two FBI agents had "observed several racks of hanging women's clothing" inside the Milford warehouse. C.A. App. 3, 5, 9, 12, 15, 18.

Agent Frisoli stated in his affidavit that on September 26, 1984, Ms. Anne Sweeney, a Casual Corner store manager, visited Fashions On Tremont ("FOT") in Boston accompanied by an FBI Agent. Ms. Sweeney observed the following articles of clothing for sale at FOT, articles which were manufactured exclusively for sale at Casual Corner stores: eight Newsport skirts, twelve Jenniffer blouses, and twelve Organically Grown sweaters. Ms. Sweeney also observed one hundred Jennifer Reed cotton knit vests and two down angora vests which she identified as having been made exclusively for Casual Corner, even though the labels had been removed. C.A. App. 4, 10, 16; App. 4a, 19a. At no time did Ms. Sweeney observe any "cartons of women's clothing," the words used in each of the three search warrants to describe the items to be seized. App. 3a, 15a, 20a.

None of the three search warrants issued by the Magistrate included any lists or descriptions of the specific items of clothing observed by Ms. Sweeney, nor any lists of the store numbers, names and addresses shown on the stolen cartons' delivery slips.

On September 28, 1984, three separate teams of FBI agents executed the search warrants in Revere, Milford and Boston. The executing agents brought Casual Corner managers to all three locations to help the agents look for Casual Corner property and "to identify clothing belonging to their company that should not be for sale outside

. . . Women's Specialty Retailing." Petition ("Pet".) 4; C.A. App. 72-76.

From FOT in Boston, the agents seized two hundred sweaters, three jackets, seventy-two blouses, sixty-four pairs of pants, five shirts, a blank Mastercard slip and an FAD invoice. C.A. Supp. App. 1. The executing agents first removed the clothing from hanging racks at FOT and then placed the clothing into seven bags, which the agents seized. No cartons of clothing were taken. App. 5a; C.A. App. 66.

From FAD in Revere, the agents seized twenty-nine cartons "of assorted women's clothing," one hundred and eleven Sasson dresses, one hundred and thirty *men's* corduroy sport jackets and four empty boxes. The return of the warrant signed by Agent Frisoli contains no reference whatsoever to Casual Corner clothing or boxes. App. 5a, 11a, 22a; C.A. Supp. App. 2.

Prior to executing the search warrant at the warehouse in Milford, Special Agent Arthur W. Ryall spoke with Respondent Fuccillo, who had met the agents when they arrived. The following is quoted directly from Special Agent Ryall's official report of the search:

> SA RYALL explained to FUCCILLO that there were some items located in the warehouse that had mailing labels to "FAD, 5 Fayette Street, Milford, Massachusetts," and if these items were legitimate FUCCILLO should inform the FBI. FUCCILLO did not respond and SA RYALL then told him the entire contents of the warehouse were going to be taken. FUCCILLO responded, "You're going to take everything?"

C.A. Supp. App. 3. The agents did take "everything," and seized the *entire contents* of the Milford warehouse. App. 5a, 11a, 22a; C.A. App. 92.

Moreover, although the executing agents removed five hundred and eighty-four "cartons of women's clothing" from the Milford warehouse, this clothing had been hanging on racks when the agents arrived. The agents took the clothing off the racks, placed the clothing in cartons, and then seized the cartons. C.A. Brief For Appellant 5. The items seized from the Milford warehouse included women's pullovers, Sasson skirts, and some Casual Corner clothing. The agents also seized a number of bins of clothing, racks holding one hundred and fifty *men's* corduroy sport jackets, empty cardboard cartons, and papers and receipts. App. 5a, 22a; C.A. App. 91-92; C.A. Supp. App. 10-23.

On October 12, 1984, two weeks after the searches, thirty-five to forty percent (*i.e.*, one hundred and ninety-three boxes) of the clothing seized by federal agents from the Milford warehouse had to be returned to the Respondent. C.A. App. 83, 87, 92-93; C.A. Supp. App. 24.

REASONS FOR DENYING THE PETITION

I. The Court Below Properly Applied the Standards In United States v. Leon Consistent With The Decisions Of Other Circuit Courts.

Review by the Court on writ of certiorari is not a matter of right, but of judicial discretion, "and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. The Petitioner has asked the Court to review the decision in this matter rendered by the First Circuit Court of Appeals "to resolve the substan-

tial differences between the circuits in the application of [*U.S. v.*] *Leon* to warrants that are found to be insufficiently particularized." Pet. 8. See Sup. Ct. R. 17.1(a). However, a comparison of the decisions cited by the Petitioner from other circuits confirms that the First Circuit in this case applied the standards set forth in *U.S. v. Leon* in accordance with the other circuits that have considered the so-called "good faith exception" to the exclusionary rule announced by the Court in *Leon*. Therefore, the government's Petition for Certiorari should be denied.

The First Circuit found that the warrants authorizing the three searches conducted by FBI agents at the Respondent's premises "were constitutionally impermissible in their failure to satisfy the particularity requirements of the Fourth Amendment." App. 12a. The FBI agents in this case did not take "every step that could reasonably be expected of them" to obtain constitutionally sufficient warrants. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In regard to the Milford and FAD warrants which authorized the search of two clothing warehouses, the First Circuit found that the FBI apparently made "no effort" to obtain or to include in the warrants the information contained upon the delivery slips attached to the stolen cartons of clothing, "identifying the store that was receiving the goods, including the store number, name and address." App. 9a. The Court noted that the warrants, directing the agents to seize "cartons of women's clothing," instead could easily have directed the agents to "cartons of women's clothing from Casual Corner Stores" or "cartons from Women's Specialty Retailing". App. 9a.

In regard to the search of FOT in Boston, the First Circuit stated that "[i]t is beyond cavil that the warrant

for the search of FOT could have been written with precision to assure that appellee's personal rights would remain inviolate," by including the "very detailed list of articles" identified for the FBI by Ms. Sweeney. App. 9a-10a. The First Circuit found the FOT warrant to be "glaringly deficient" in not "identifying these articles of clothing with specificity, thus limiting the scope of the seizure. . . ." App. 10a.

The Petitioner has alleged that the First Circuit misread the decision of this Court in *United States v. Leon* and "effectively held the agents to a standard of near perfection in the drafting of warrants." Pet. 8. The Petitioner argues that "it is difficult to imagine how the warrants could have been drafted more narrowly without imposing inappropriate limitations on the items to be seized," adding that the First Circuit's suggestions for improving the warrants were "plainly flawed," because the suggested limitations "might well have omitted much, if not all, of the stolen property that the agents clearly had probable cause to seize." Pet. 10-11. How the addition of a list of identified items or the words "Casual Corner clothing" to the warrant would have caused "much, if not all of the stolen property" to be omitted from the scope of the warrant is difficult to fathom.

Moreover, the Petitioner cites with approval the Second Circuit case of *United States v. Buck*, No. 86-1500, slip. op. at 1810 (2d Cir. Mar. 10, 1987), where the court ruled that "the use of a catch-all description in a search warrant, unaccompanied by any list of particular items or any other limiting language" was constitutionally deficient. The *Buck* court noted that the search in that case

was conducted in 1981, years before the July, 1984 decision in *United States v. Leon,* and prior to the time when the jurisdiction in which the officers were operating first spelled out the particularity requirement for warrants. As such, the Second Circuit found that a reasonably well-trained officer could not have been expected to know in 1981 that the general search warrant issued by the judge in that case violated the particularity requirements of the Fourth Amendment. *Id.*

The *Buck* decision is wholly consistent with the decision rendered by the First Circuit in the instant case. The search warrant in the present case was issued in September of 1984, several months after the decisions in *U.S. v. Leon* and *Massachusetts v. Sheppard.* Further, the federal agents in this instance had available to them established rules for drafting so-called "generic" warrants, which were set forth in three First Circuit cases dating from 1977, 1978 and 1979.[1] See Pet. 13, n. 6.

The other Second Circuit decision cited by the Petitioner, *United States v. Scharfman,* 448 F.2d 1352 (2d Cir. 1972), is also consistent with the First Circuit decision. *Scharfman* involved the hijacking of a shipment of hundreds of furs. The informant in *Scharfman* was an experienced furrier who alerted the FBI that furs from the hijacked shipment were located at the defendant's premises. Also, an employee of the owner of the furs positively identified a fur coat in the defendant's store as being part of the hijacked load.

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[1] *United States v. Cortellesso,* 601 F.2d 28 (1st Cir. 1979), *cert. denied,* 444 U.S. 1072 (1980); *Montilla Records of Puerto Rico, Inc. v. Morales,* 575 F.2d 324 (1st Cir. 1978); *United States v Klein,* 565 F.2d 183 (1st Cir. 1977).

In contrast, the informant relied upon by the FBI in the instant case was not an expert in the field of women's clothing. In fact, Agent Frisoli's affidavit contains not one word concerning the informant's background, reliability or the basis of his or her alleged knowledge that clothing stolen from Casual Corner was located at the Respondent's premises. Nor did Ms. Sweeney, the Casual Corner manager who identified the specific articles of clothing at FOT, recognize any of the items as having been part of the clothing stolen from Women's Specialty Retailing. Therefore, unlike *Scharfman,* "there was no evidence presented to the magistrate to support the conclusion that stolen goods constituted a dominant or even a significant part of the inventory on the premises . . . ." *United States v. Cortellesso,* 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied,* 444 U.S. 1072 (1980).

The Eleventh Circuit decision cited by the Petitioner, *United States v. Accardo,* 749 F.2d 1477 (11th Cir. 1985), *cert. denied,* No. 85-518 (Nov. 4, 1985), also conforms with the First Circuit standards. The search warrant in *Accardo* authorized the seizure of "all corporate records." *Id.* at 1481. The crime alleged in *Accardo* was a type of complex financial fraud, sometimes referred to as a "paper puzzle," which has been held to justify a more flexible reading of the Fourth Amendment particularity requirement. *Id.*, and cases cited. In contrast, the executing agents in this case were searching for stolen Casual Corner clothing, which does not require specialized expertise or knowledge to identify.

Further, the Eleventh Circuit found that the warrant "was not seriously challenged by any of the defendants."

Id. at 1480. The Respondent in this case challenged the use of the Milford warehouse search warrant at the time of its execution, asking one of the executing agents, "You're going to take everything?," which is precisely what the agents did.

II. The Flagrant And Deliberate Misconduct Of The Agents In Executing The Warrants Cannot Constitute Good Faith.

The circuit court in *Accardo* remanded that case to the district court for an evidentiary hearing to consider the issue of the executing officers' good faith. *Id.* at 1481. The *Accardo* court cited *Leon* for the proposition that in determining whether a police officer acted in good faith, "all of the circumstances . . . may be considered," adding that evidence needed to be elicited "touching upon the conduct of the officers." *Id.*, citing *Leon*, 468 U.S. 897, 922, n.23. This statement in *Accardo* raises the second proposed basis for review argued by the Petitioner, whether the First Circuit court misread *Leon* "when it concluded that agents cannot be acting in good faith when some of the items they seize are outside the four corners of the warrant." Pet. at 8. The Petitioner mistakenly concludes that "*Leon* itself imposes no such limitation." *Id.*

The Court in *Leon* held that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges or magistrates."[2] *Leon*, 468 U.S. at

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[2] The Petitioner clearly misconstrues this standard by arguing that "suppression is appropriate only when *the magistrate* or agent *has wholly abdicated his professional responsibilities.*" App. 9a. (emphasis added).

916. The Court noted that the discussion in *Leon* of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Leon*, 468 U.S. at 918, n.19. In addition, the Court stated that in weighing the deterrent effect of exclusion, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus." *Id.* at 911. The Court has not seriously questioned the continued application of the exclusionary rule where a Fourth Amendment violation has been "substantial and deliberate." *Id.* at 908-909, and cases cited.

Applying these principles to the facts of this case, it is unarguable that the First Circuit did not misread *Leon*, but rather properly found that the FBI agents did not act in objective good faith in reasonable reliance upon "facially valid" warrants. It is the government, not the defendant, that bears the burden of proving that its agents' reliance upon the warrants was reasonable. *United States v. Michaelian*, 803 F.2d 1042, 1048 (9th Cir. 1986), cited at Pet. 16-17.

The facts clearly indicate that the executing agents knew that the three warrants were so facially deficient in failing to particularize the articles to be seized that the agents could not reasonably presume them to be valid. App. 12a; *Leon*, 468 U.S. at 923. First, the executing agents brought with them to each of the locations to be searched a Casual Corner manager to help the agents look for Casual Corner property and "to identify clothing belonging to their company that should not [have been] for

sale outside . . . Women's Specialty Retailing." Pet. 4; C.A. App. 72-76. If the agents had believed the warrants to be sufficiently particularized to allow them to distinguish the stolen Casual Corner goods from the other clothing at the Respondent's premises, they would not have required the Casual Corner managers to help them identify the stolen goods.

Second, to be constitutionally sufficient, search warrants must leave nothing to the discretion of the officers executing the warrant. App. 6a, 16a and cases cited. The search warrants authorized the executing agents to seize "cartons of women's clothing." The facts show that the executing officers improperly exercised discretion in searching at all three locations.

At FOT in Boston the agents exercised discretion by removing clothing from racks at the store and placing the clothing in bags, which they then seized. App. 5a; C.A. App. 66.

At FAD in Revere, the executing agents exercised their discretion by seizing some "cartons of assorted women's clothing," but also by seizing racks of women's dresses, racks of men's corduroy sports jackets, and empty boxes. App. 5a, 11a, 22a; C.A. Supp. App. 2.

The most flagrant, substantial and deliberate misuse of "discretion" occurred at Milford, where the executing agents intentionally seized the entire contents of the Milford warehouse after the Respondent refused to reply to Agent Ryall's questions asking which items were "legitimate." If the Milford search warrant had been sufficiently particularized, such questioning would not have been necessary. Moreover, the trained FBI agents knew

or should have known that to take everything from the warehouse, including racks of men's clothing, far exceeded the authorized scope of the search. App. 5a; 22a; C.A. App. 91-92; C.A. App. 10-23. As proof of their knowledge that they were exceeding the scope of the warrant, the agents intentionally removed clothing at the Milford warehouse from hanging racks and placed the clothing into cartons before seizing it, in a transparent attempt to comply with the dictates of the warrant. C.A. Brief for Appellant 5.

Finally, the scope of the Milford search warrant was so excessive that the agents were later required to return to the Respondent thirty-five to forty percent of the items the agents had seized. C.A. App. 83, 87, 92-93, C.A. Supp. App. 24.

The Court has repeatedly held that "because the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Illinois v. Krull*, No. 85-608 (Mar. 9, 1987), citing *United States v. Peltier*, 422 U.S. 531, 542 (1975). Because the facts here show that the FBI agents did have knowledge that the searches were unconstitutional, the First Circuit properly applied the standards of objective "good faith" set forth in *Leon*, and affirmed the lower court's allowance of the Respondent's Motion to Suppress.

———o———

CONCLUSION

Considering the intentional and flagrant conduct of the executing officers, and weighing all of the circumstances, the Petitioner is incorrect in alleging that the First Circuit misread *Leon* in deciding the present case. Where, as here, the FBI agents did not take every step that could reasonably be expected of them in drafting the warrants, as required by *Massachusetts v. Sheppard,* and where the flagrant misconduct of the agents in executing the warrants cannot reasonably be construed as acting in good faith, it is respectfully submitted that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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No. 86-1622

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CARL A. FUCCILLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1986

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition, we contended that the court of appeals' judgment upholding the suppression of evidence in this case misread this Court's decision in *United States* v. *Leon,* 468 U.S. 897 (1984), in two important respects. First, by holding that the good faith exception requires agents to " 'take every step that could reasonably be expected of them' " (Pet. App. 11a), the court of appeals—in marked contrast to the approach followed in other circuits—effectively held the agents in this case to a standard of near perfection in the drafting of search warrants. Second, by holding that agents cannot be acting in good faith when they have seized some items that are outside the four corners of the warrant, the court of appeals created a novel exception to the good faith rule nowhere contemplated by the *Leon* decision.

1. Respondent endorses (Br. in Opp. 5-6) the court of appeals' conclusion that agents do not act in good faith unless they have taken every reasonable step to particularize a warrant. But like the court of appeals, respondent fails to explain how such an exacting standard can possibly be squared with the *Leon* decision. The Court

made it clear in *Leon* that the good faith exception applies unless "a warrant [is] * * * so facially deficient—*i.e.*, in failing to particularize the * * * things to be seized—that the executing officers cannot reasonably presume it to be valid" (*Leon*, 468 U.S. at 923). In so stating, the Court plainly did not intend warrants to be found "so facially deficient" every time a reviewing court can imagine some "reasonable step" that the agents might have taken to narrow the warrant still further.[1]

2. Respondent attempts unsuccessfully to show that the court of appeals' grudging application of *Leon* is consistent with the approach adopted by other circuits.[2] He distinguishes (Br. in Opp. 6-7) the decision of the Second Circuit in *United States* v. *Buck*, 813 F.2d 588 (1987), contending that the search in the *Buck* case was executed prior to the decision in *Leon*, while the search in this case took

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[1] The court of appeals itself proposed two such "reasonable steps" (Pet. App. 11a-12a), but as we showed in the petition (Pet. 10-11), narrowing the warrants in those ways would have omitted much, if not all, of the stolen property that the agents clearly had probable cause to seize. Respondent now claims (Br. in Opp. 6) an inability "to fathom" how adding the words "Casual Corner clothing" could have caused the warrants to omit most of the stolen apparel. As we explained in the petition (Pet. 3), the affidavit for the search warrants established that the labels on some of the clothing had been removed prior to the search. Moreover, retaining the Casual Corner labels in the garments would have been virtually an admission that the clothes were stolen. Under these circumstances, the agents' decision to draft the warrants without a reference to Casual Corner was not unreasonable. And still less was it an exercise of bad faith to rely on the magistrate's determination that the warrants, as drafted, were sufficiently particularized.

[2] Respondent does not address the conflict between the decision of the court of appeals in this case and the decisions of the Eighth Circuit in *United States* v. *Faul*, 748 F.2d 1204 (1984), cert. denied, 472 U.S. 1027 (1985), and the Ninth Circuit in *United States* v. *Michaelian*, 803 F.2d 1042 (1986).

place after *Leon*. We fail to understand the relevance of that distinction. Certainly the Second Circuit did not appreciate any such distinction, since it expressly read the First Circuit's decision in this case as in conflict with its own decision (see 813 F.2d at 592 n.1). More generally, we cannot imagine how the timing of the *Leon* decision could possibly bear on whether an agent drafted a warrant in good faith. There is no plausible reason why a warrant drafted after *Leon* is, for that reason, more likely to have been prepared in bad faith than a warrant that preceded that decision.

Respondent also contends that unlike in *Buck* the agents in this case "had available to them established rules for drafting so-called 'generic' warrants" (Br. in Opp. 7). But as we showed in the petition (Pet. 12-13 & n.6), each of the First Circuit cases cited by respondent as a source of the "established rules" had identified the Second Circuit's decision in *United States* v. *Scharfman,* 448 F.2d 1352 (1971), cert. denied, 405 U.S. 919 (1972), as an example of a sufficiently particularized warrant. Respondent fails to show how the warrant in the *Scharfman* case is any different from the warrants issued in this case.[3] More fun-

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[3] Respondent distinguishes *Scharfman* (Br. in Opp. 7-8) on the ground that the informant in that case had more "experience[]" than the informant in this case in identifying the particular stolen merchandise. But the Second Circuit in *Scharfman* did not even refer to the expertise of the informant in upholding the particularity of the warrant. Moreover, there is no evidence in this case—and none was presented to the magistrate—to substantiate respondent's claim (Br. in Opp. 8) that the informant in this case "was not an expert in the field of women's clothing." Respondent also asserts (*ibid.*) that in this case, unlike in *Scharfman,* there was no evidence presented to the magistrate showing that stolen goods made up a significant part of respondent's inventory. But that is not so: in a 10 to 15 minute perusal of FOT alone, Ms. Sweeney observed some $6,000 worth of Casual Corner merchandise that should not have been for sale on the premises.

damentally, even if the warrants in this case had strayed from the First Circuit's rules for generic warrants, surely that was a legal judgment for the magistrate, not the agents, to make. Like the court of appeals, respondent would hold agents to a standard of legal sophistication that would invariably require them "to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient" (*Leon*, 468 U.S. at 921).

Respondent contends that the Eleventh Circuit's decision in *United States* v. *Accardo*, 749 F.2d 1477 (1985), cert. denied, No. 85-518 (Nov. 4, 1985), is not in conflict with the decision in this case because the nature of the offense in *Accardo*—a "complex financial fraud" (Br. in Opp. 8)—justified the agents' reliance on broad search warrants. Respondent misreads the *Accardo* case. To be sure, in explaining why the agents had acted in good faith despite having drafted warrants that were broader than the warrant approved in *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), the Eleventh Circuit noted (749 F.2d at 1481) that the type of crime "has been held to justify a more flexible reading of the fourth amendment." But the court of appeals in *Accardo* plainly did not predicate its good faith holding on that ground. Rather, the court held (749 F.2d at 1480)—in sharp contrast to the First Circuit in this case—that the agents had "submitted a detailed affidavit to a magistrate * * * who found probable cause and issued the warrants." Moreover, the Eleventh Circuit made clear (*id.* at 1481) that even if the warrants could have been more narrowly drafted, "this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it."

3. Respondent concedes (Br. in Opp. 9) that the court of appeals held, as a matter of law, that the good faith exception is unavailable whenever agents have seized some items outside the scope of the warrant. Respondent con-

tends (*id.* at 9-10) that such a limitation on the good faith exception is implicit in the *Leon* decision, but he cites no support for that proposition other than to quote out of context the same sentence mistakenly relied on by the court of appeals (see Pet. App. 11a; see also Pet. 17 n.11). Respondent also contends that the agents' execution of the warrants amounted to "flagrant and deliberate misconduct" (Br. in Opp. 9). As a preliminary matter, we do not see how the agents' execution of the warrants can possibly bear on whether the warrants were drafted with sufficient particularity to justify a finding of good faith. Moreover, respondent's characterization of the agents' execution practices is wholly unjustified. The fact that the agents brought experts from Casual Clothing to assist in the searches demonstrates, if anything, the agents' effort to cause the smallest feasible disruption to respondents' inventory. The fact that the agents removed items of clothing from racks and placed them into cartons proves only that they were doing their job; it hardly merits the extravagant claim (Br. in Opp. 12) that the agents were engaged "in a transparent attempt to comply with the dictates of the warrant." And while it is true that the agents seized certain items in plain view that were not mentioned in the warrants, they did so only after first discovering probable cause to believe that a substantial portion (and, as far as the agents could determine during the search, the entire portion) of those items was also stolen (see Pet. 4-5).

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

MAY 1987